

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BANFF, LTD. f/k/a
SWEATER BEE BY BANFF, LTD.,

Petitioner,

— v. —

SALANT CORP., as successor in interest (by merger)
to both MANHATTAN INDUSTRIES, INC. and
BAYARD SHIRT CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

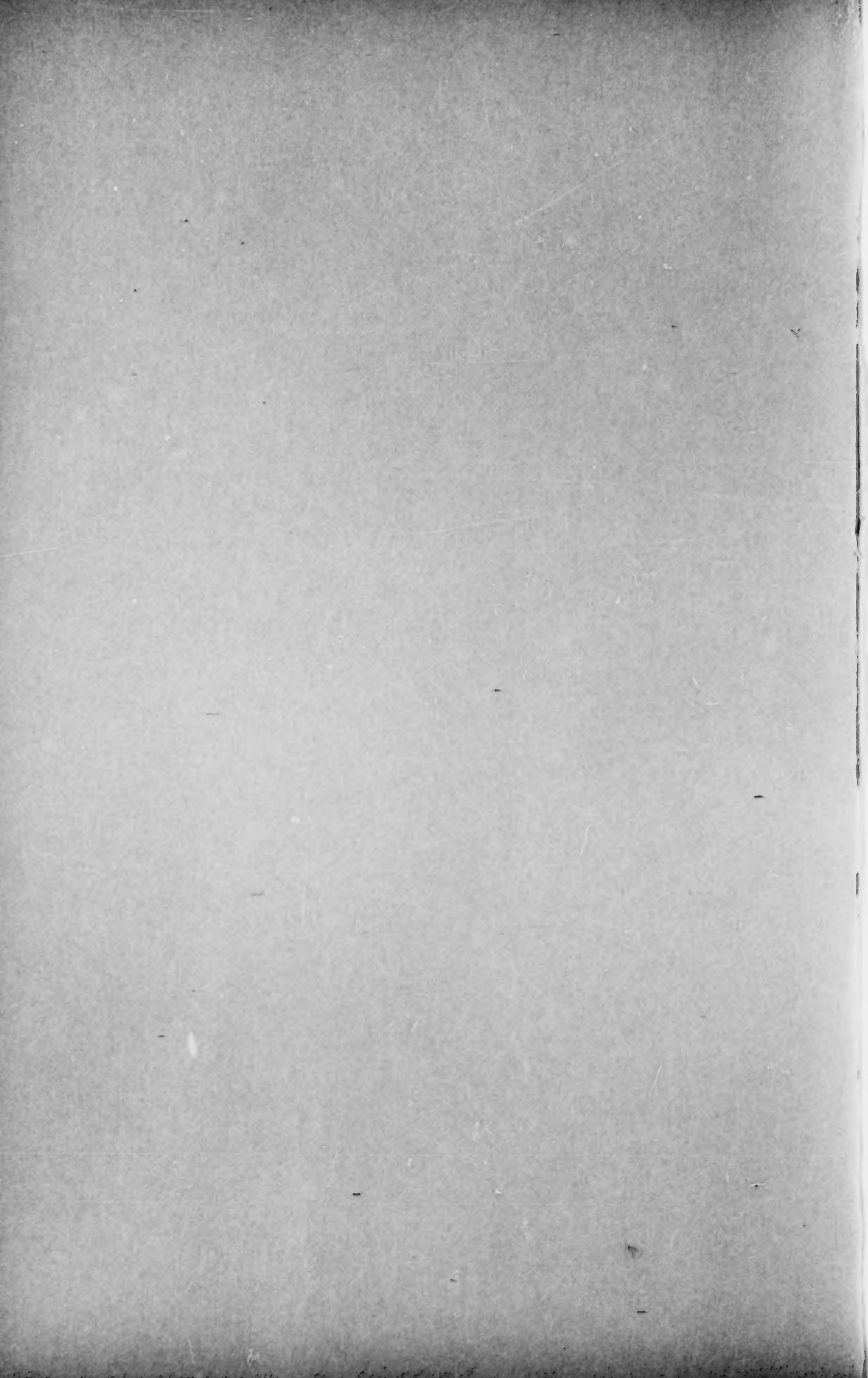
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February 16, 1990

1990



Question Presented

1. Did the District Court adequately identify the basis for its award of sanctions for discovery abuses where 1) the conduct complained of is fully documented in the record and discussed in detail in memoranda submitted by both parties; 2) the party sanctioned had ample notice of the charges of improper conduct and opportunity to respond; and 3) the Court stated that it "essentially agreed[d]" with the lengthy detailed discussion of the specific conduct complained of in memoranda submitted by the party requesting the sanction and considered the responses submitted by the party sanctioned to be "woefully inadequate"?

STATEMENT PURSUANT TO RULE 29.1

The respondent Salant Corporation has no parent companies, is not the subsidiary of any company and has the following non-wholly owned subsidiaries:

Carrizo Manufacturing Co., S.A. de C.V.

Maquiladora Sur, S.A. de C.V.

Perry Ellis Canada

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STATEMENT OF THE CASE

The statement of the case set forth by petitioner is inaccurate in several respects. In an attempt to claim that there was no legitimate basis for the monetary sanction imposed,¹ petitioner

¹ The sanction took the form of the assessment of one-third of the Special Master's fees and expenses against petitioner. (See Petition for Certiorari ("Petition") at 9, fn. 4.) The parties had shared payment of those fees and expenses during the contempt proceedings. Accordingly, respondent Bayard Shirt Corp., which is liable for two-thirds of the fees, is liable to petitioner for approximately \$14,000 of the fees. Petitioner, however, seeks to avoid any responsibility for payment of the Master's fees and expenses.

fails to mention its counsel's repeated discovery violations and failures to comply with the Special Master's orders throughout the civil contempt proceeding.² In addition, petitioner fails to acknowledge that the specific conduct which formed the basis for the award of sanctions is clearly documented in the record, was described in detail in memoranda submitted by the parties, and was specifically identified by reference in the Special Master's Report which was confirmed in all respects by the District Court. Accordingly, petitioner's statement that the Special Master and the District Court never specified "what the alleged discovery violations were" (Petition at 6) is simply incorrect.

Another significant inaccuracy in petitioner's statement of the case is the suggestion that the sanction imposed against it was not based on clearly established discovery violations committed by petitioner and its counsel but was in retaliation for petitioner's motion to recuse the Special Master.³

To create this erroneous impression, petitioner juxtaposes its recusal motion, which was based on an off-hand remark made by the Special Master with regard to payment of fees for his associate's time, with the Special Master's recommendation of an award of sanctions occurring eighteen months later, after extensive conferences and hearings in the civil contempt proceeding.⁴ However, petitioner fails to acknowledge that when

² The order appointing the Special Master directed him to hear and determine all discovery issues. (A57-58.)

³ The basis for the recusal motion — that the Special Master asked the parties to pay for his associate's time — was rendered moot because petitioner agreed to pay for the associate's time. Petitioner did not argue to the Court of Appeals, nor does it argue here, that the Special Master should have been recused.

⁴ The recusal motion must be seen in the context of petitioner's counsel's consistent and adamant opposition to the Master's discovery rulings and to the very appointment of the Special Master to conduct the civil contempt proceedings. Even before the recusal issue arose, petitioner had repeatedly indicated its unwillingness to abide by the discovery schedule set by the Special

(Footnote continued)

it made its recusal motion to the District Court, the Court dismissed it as "frivolous." (See A116-129.) Nor did it pursue the matter on appeal.⁵

1. *The Basis for the Special Master's Ruling.*

In its Post-Hearing memoranda submitted to the Special Master, Manhattan/Bayard⁶ set forth in twenty-seven pages, the specific discovery violations committed by petitioner's counsel. (A71-115.) The description of the discovery abuses of which Manhattan/Bayard complained was supported by extensive citations to the record.⁷ Petitioner's counsel clearly understood specifically what discovery violations he was accused of because he submitted a 14 page affidavit responding in detail to respondent's claims. (A48.)

Master. (See A124-129.) After failing to get the discovery schedule it wanted, petitioner made a motion to the District Court to set aside the discovery schedule set by the Special Master. (See A116-129.) The recusal motion was made in conjunction with this motion and was clearly raised as a tactic to avoid a discovery schedule petitioner disliked. This conduct followed petitioner's failure to persuade the District Court that no Special Master should be appointed and an unsuccessful interlocutory appeal to reverse the appointment of the Special Master (which was dismissed by the Second Circuit).

⁵ Petitioner states that in requesting the sanction, "Bayard adroitly reminded the master" of the recusal motion. (Petition at 9.) In fact, in its 27 pages of memoranda on the subject, Manhattan/Bayard mentioned the recusal motion in two sentences, as part of a chronology of events. (See A80-81.)

⁶ "Manhattan/Bayard" refers to Manhattan Industries, Inc., Bayard Shirt Corp., Champ pierre Ltd., Donald Kallman, Robert Hamel, Laurence C. Leeds and Fred Feldstein. Petitioner has adequately identified these parties. None of these parties other than Bayard was found in contempt at any stage of this proceeding.

⁷ Among the discovery abuses cited by Manhattan/Bayard were petitioner's repeated refusal to abide by the discovery schedule set forth by the Special Master (A76-80); its failure to begin reviewing documents until ten weeks after the first hearing before the Special Master (A79); its failure to produce copies of the bulk of its documents until 4 1/2 months after the first hearing despite repeated orders by the Special Master requiring earlier production (A81-83); and its extensive delay in providing adequate interrogatory responses. (A84-88.)

The Special Master's Report clearly set forth the basis for the recommendation that 1/3 of the Master's fees be assessed against petitioner as a sanction for its counsel's conduct during the proceeding. The Special Master's Report stated:

"Bayard's basis for its allocation of fees is detailed in Point IV, pages 108-26 of its post-hearing memorandum and at pages 30-37 of its post-hearing reply memorandum. In his opposition to Bayard's application, Mr. Grossman, counsel to SB, has submitted a lengthy affidavit with numerous exhibits attached. Therein he offers only some of the myriad of excuses for his conduct that he has raised throughout these lengthy proceedings, all of which had been heard and thoroughly considered on all too many prior occasions.

I do not intend to burden the Court with a recitation covering the conduct of SB's counsel in these proceedings, for to do so would add immeasurably to the length of this report. Suffice it to say that I essentially agree with the accuracy of Bayard's statements in this regard and feel that Mr. Grossman's responses are woefully inadequate. The cases allowing sanctions involved conduct by attorneys far less egregious than that herein. [citations omitted.] (A48.)

Thus, by incorporating by reference the description of petitioner's counsel's conduct contained in Manhattan/Bayard's memoranda, stating he "essentially agree[d] with the accuracy of Bayard's statements," and specifically rejecting petitioner's responses thereto, the Special Master made clear the detailed basis for his recommendation. (See A48.)

2. *The Basis for the Ruling of the District Court and the Court of Appeals.*

After the Special Master issued his Report, Manhattan/Bayard moved in the District Court to confirm the Report and petitioner submitted extensive memoranda in support of its

objections to the Report and opposing Manhattan/Bayard's motion to confirm.⁸ The District Court adopted the Special Master's Report including its recommended allocation of the Master's fees as a sanction for petitioner's counsel's conduct.

The Court of Appeals also reviewed the basis for the assessment of costs against petitioner. On appeal, petitioner raised eleven arguments in support of its position that the sanction should be reversed, including the argument made here that the Master's Report did not contain specific findings.⁹

The Court of Appeals had no difficulty determining the conduct for which Sweater Bee had been sanctioned. The Court found that:

"During discovery, the special master on several occasions noted Sweater Bee's failure to comply with the discovery schedule he had established. Not only was Sweater Bee regularly delinquent in producing documents and complying with the special master's discovery orders, but it responded belatedly and inadequately to Manhattan's interrogatories. In fact, the special master cautioned that 'appropriate actions' might be taken if Sweater Bee continued to cause delay, and observed that the number of times Sweater Bee had not met discovery deadlines 'out number[s] the other side in a geometric fashion.' " (A6-7.)

The Court concluded that "the special master was in the best position to judge the nature of both parties' conduct and to apportion his fees and expenses accordingly." (A18.) Petitioner

⁸ In addition to the entire record that was before the Special Master, the District Court also had before it a total of approximately 90 pages of additional memoranda submitted by the parties discussing in detail the conduct which was the basis for the Special Master's recommended sanction.

⁹ Petitioner also spent 1 1/2 pages describing its recusal motion based on the Special Master's request that the parties pay for his associate's time.

moved for rehearing and again argued that the sanction should be reversed "for want of specific findings." (A130.)¹⁰ The Court of Appeals denied the petition for rehearing, without comment.

REASONS WHY THE WRIT SHOULD BE DENIED

This case presents no issues worthy of certiorari. Contrary to petitioner's claim, this case involves no conflict with other Circuits. Rather, the petition is merely a routine attempt by a client and its attorney to avoid a discovery sanction assessed below. Petitioner does not dispute that it had notice of the conduct complained of and ample opportunity to respond. Petitioner also does not contend in this Court that the finding below that discovery violations occurred as described in Manhattan/Bayard's memoranda is clearly erroneous, nor does it contend that those violations were insufficient to warrant the imposition of sanctions.

The only issue raised here is whether the District Court erred because it did not itself list the specific discovery violations on which the award of sanctions was based, but instead, adopted the Special Master's Report which incorporated by reference the detailed description of the numerous discovery violations contained in Manhattan/Bayard's memoranda.

Where the basis for the discovery sanction is clearly articulated, there is no technical requirement that the District Court specifically itemize each violation in its ruling. *See Patton v. Aerojet Ordnance Co.*, 765 F.2d 604, 608 (6th Cir. 1985). The Second Circuit did not err in failing to impose such a requirement.

* The argument made in the petition for rehearing is virtually identical to the argument made here. Indeed parts of that argument are repeated here verbatim. (See A130-134.)

I. The Decision of the Court of Appeals Does Not Permit "Conclusory Discovery Fines" and therefore is not in Conflict with Holdings in Other Circuits.

Petitioner mischaracterizes the Second Circuit's opinion as approving "conclusory discovery fines" in conflict with the law in other Circuits. (Petition at 11.) In fact, the Second Circuit did not condone the imposition of discovery fines "without specifying what the alleged violations were." (*Id.*) The Special Master's Report, adopted by the District Court, *did* contain a detailed description of the discovery abuses which formed the basis for the award. That the description was incorporated by reference does not mean, as petitioner suggests, that the Special Master and the District Court did not make any specific findings. Indeed, the Second Circuit had no difficulty ascertaining the specific violations found by the Special Master. The Court noted that the Special Master found that Sweater Bee 1) "fail[ed] to comply with the discovery schedule;" 2) was "regularly delinquent in producing documents;" and 3) "responded belatedly and inadequately to Manhattan's interrogatories." (A6.)

None of the cases from other Circuits cited by petitioner suggest that this level of specification is too "conclusory" to form the basis for discovery sanctions. Significantly, three of the four cases cited by petitioner involve the sanction of dismissal or default judgment for failure to comply with discovery orders. *See Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978); *Patton, supra*; *Von Der Heydt v. Rogers*, 251 F.2d 17 (D.C. Cir. 1958). Although petitioner argues that the fact that the modest monetary sanction awarded here "falls short of a final dismissal" is irrelevant (Petition at 14), the cases themselves make clear that there are special considerations when the sanction imposed is the "sanction of last resort." *Patton, supra*, 765 F.2d at 607. *See Wilson, supra*, 561 F.2d at 503.

In addition, these cases do not require any greater specificity in setting forth the basis for a monetary discovery fine than existed here. For example, in *Patton*, the Court held that the

sanction of dismissal must be "accompanied by some articulation on the record of the court's resolution of the . . . issues presented." 765 F.2d at 608, quoting *Quality Prefabrication, Inc. v. Daniel J. Keating Co.*, 675 F.2d 77, 81 (3rd Cir. 1982). That articulation was certainly provided here.¹¹

In sum, there is no reason for this court to disturb the Second Circuit's decision since it does not constitute "tolerance of conclusory discovery fines" and is therefore not in conflict with holdings in other Circuits.

II. The Second Circuit Correctly Relied on Cases Holding That the District Court has Broad Discretion to Apportion Special Master's Fees.

The District Court's August 23, 1984 order referring the issues relating to civil contempt to a Special Master specifically states that "the ultimate responsibility for the master's fees [is] to abide the event." (A57.)

The law is clear that the apportionment of a special master's fees rests in the discretion of the District Court and will not be disturbed absent an abuse of discretion. *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1220 (6th Cir.), *cert. denied*, 484 U.S. 820 (1987) ("[t]he district court has broad discretion to determine which of the parties to charge" with special master's fees); *Morgan v. Kerrigan*, 503 F.2d 401, 427 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). Thus, the Second Circuit properly concluded, relying on these cases, that "the Special Master was in the best position to judge the nature of both parties' conduct and to apportion his fees and expenses accordingly" and that the district court did not "abuse[] its discretion in approving the apportionment." (A18.)

¹¹ In *Carlucci v. Piper Aircraft Corp., Inc.*, 775 F.2d 1440 (11th Cir. 1985), as petitioner points out, the Court held that "in cases invoking the sanction power of Rule 37 the district court must 'clearly state its reasons so that meaningful review may be had on appeal.'" 775 F.2d at 1453, quoting *Wilson, supra*, 561 F.2d at 505. (See also Petition at 11.) While this requirement is undoubtedly correct, it is also undoubtedly true that it was met here. Petitioner was not deprived of meaningful appellate review.

Petitioner argues that the Second Circuit's opinion is in error because it "overlooks the basis of the apportionment: The master's fees were apportioned against Banff *solely* because of Banff's alleged discovery violations without the master's ever having specified what they were." (Petition at 14.) This statement is blatantly wrong on two counts. First, the Second Circuit clearly did not overlook the basis for the apportionment; it clearly understood that the basis for the apportionment was petitioner's counsel's "'conduct throughout the proceeding'" including his "'numerous failures'" "'to meet discovery deadlines.'" (A18.) Second, the Master *did* specify the discovery violations which formed the basis for his recommendation of a sanction. (*See supra* at 4.)¹²

There is thus no basis for this Court to find that the Second Circuit erred in affirming the District Court's discretionary apportionment of special master's fees.

¹² Sweater Bee's extensive papers in the District Court and the Court of Appeals leave no doubt on this point — its counsel had no difficulty briefing the issues regarding discovery sanctions.

CONCLUSION

If this Court were to grant the petition and reverse the sanction assessed below, that result would severely undercut the authority of District Courts to award sanctions for discovery abuse. As this Court has observed, the District Courts must have the power to award sanctions both as punishment of those whose conduct warrant sanctions and to deter others from engaging in such conduct. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). Where, as here, the District Court's findings are supported by the record, an award of sanctions should not be reversed for abuse of discretion.

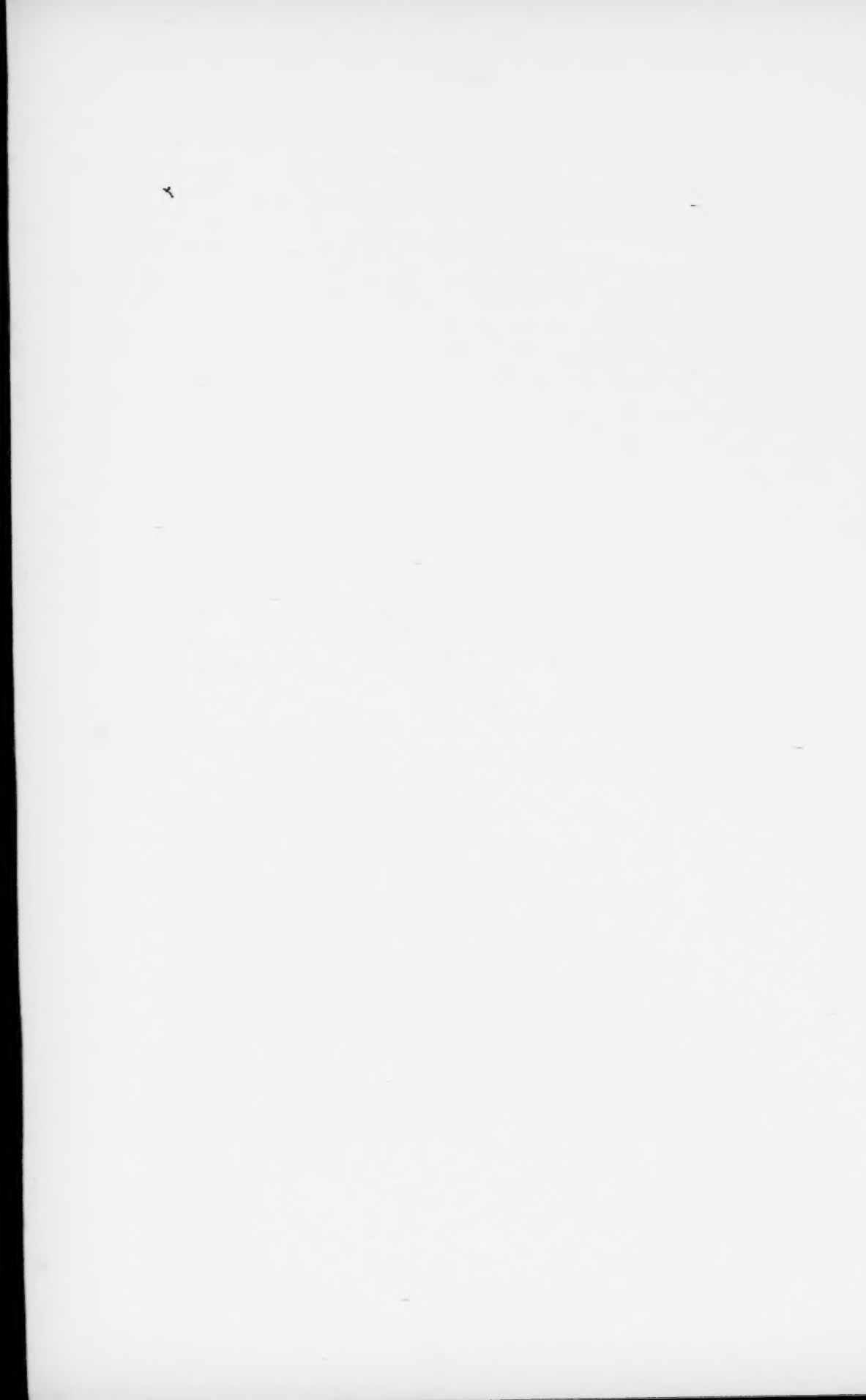
This case was correctly decided by the Court of Appeals for the Second Circuit. The decision does not conflict with decisions of the Supreme Court or of other Circuits. Accordingly, respondent respectfully suggests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit be denied.

Dated: February 16, 1990

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APPENDIX



[Excerpt from Manhattan/Bayard's
Post-Hearing Memorandum]

IV

THE COSTS OF THESE PROCEEDINGS
SHOULD BE ASSESSED 75% AGAINST
SWEATER BEE AND 25% AGAINST
MANHATTAN/BAYARD

Judge Broderick's August 23, 1984 order referring the issues relating to civil contempt to a Special Master specifically states that "the ultimate responsibility for the master's fees [are] to abide the event. Manhattan/Bayard believe that the costs of the civil contempt proceedings should be allocated at a minimum 75% to Sweater Bee and (at most) 25% to Manhattan/Bayard.* Manhattan/Bayard believe this allocation is appropriate because Sweater Bee's failures to timely provide discovery and

*The Special Master may well determine that a greater percentage of such costs, even 100%, should be borne by Sweater Bee.

the conduct of Sweater Bee's counsel have delayed and multiplied the costs of these proceedings from their inception.** See 28 U.S.C. § 1927. We urge the Special Master to recommend to the Court that the costs should be so allocated.

Sweater Bee has sought a civil contempt judgement against Manhattan, Bayard, Champ pierre and the individual parties (albeit by summary judgment) since December 1983. However, since the entry of Judge Broderick's August 23, 1984 order*** which provided Sweater Bee

**The length of these proceedings, now over one year in duration, should be compared with Mr. Grossman's statement, made early in this proceeding, that "[c]ertainly there is no justification for the matter dragging out over ten months or a year. . . ." (10/26/84 Tr. at 22.)

***The Order stated that the civil contempt issues were "referred promptly" to the Special Master, an admonition that the proceedings should be expedited, as the Special Master has noted on a number

the opportunity to proceed on the civil contempt issues it had raised, Sweater Bee's continuous response has been to attempt to delay or frustrate these proceedings, by appealing the provisions of that Order, making applications to the Court and Special Master to set aside the schedule for discovery and hearings, and failing or refusing to comply with the Special Master's orders, based upon a myriad of excuses. Set forth below is a brief description of certain such Sweater Bee conduct since these proceedings began.

Despite the Court's admonitions on August 10, 1985 that the contempt proceedings "should proceed immediately" (8/10/84 Tr. at 88) and in its August 22 order that the civil contempt proceedings

of occasions. (See, e.g., 10/4/84 Tr. at 10-11.)

be "referred promptly" to the Special Master, Mr. Grossman, at the very first hearing before the Master, suggested a delay in the proceedings of two to three months to allow the Court of Appeals to decide that portion of Sweater Bee's appeal challenging the order of reference." (10/4/85 Tr. at 12, 23.) Counsel for Manhattan/Bayard opposed this suggestion, believing the parties were obliged to proceed with dispatch, and the Master rejected the suggestion. (10/4/85 Tr. at 25-29.) This delaying tactic having failed, Sweater Bee turned to other methods of delay, including a flat refusal to proceed promptly with discovery.

At the first hearing before the

*This suggestion came despite Judge Broderick's refusal to grant Sweater Bee's request for such a stay pending appeal.

Special Master on October 4, 1984, the Special Master ruled, as expected, that the parties would be entitled to discovery as to both liability and damages, and ordered the parties to meet to establish a discovery schedule. (10/4/84 Tr. at 35.) Although counsel for Manhattan/Bayard were willing to meet promptly after the October 4, 1984 conference, Sweater Bee's counsel refused to meet until nearly two weeks later, citing other commitments (primarily Sweater Bee's appeal of Judge Broderick's August 22 order). When counsel for the parties finally met on October 17, 1984, counsel for Sweater Bee stated that he was not prepared to discuss scheduling or the substance of his discovery requests. Counsel for Manhattan/Bayard nonetheless orally described to counsel for Sweater Bee their preliminary views regarding

discovery and hand delivered a preliminary list of discovery requests to Sweater Bee's counsel the next day. Nonetheless, counsel for Sweater Bee failed to even begin preparations for document production until mid-November, 1984. (12/10/84 Tr. at 6-9; 25-26; 29-30.)

On October 26, 1984, the parties met again with the Special Master, who had prepared a discovery schedule which he gave to the parties. That schedule, as modified by the discussion at the hearing, provided, inter alia, for document production to be completed and interrogatories to be answered by mid-December, 1984. Due to Sweater Bee's repeated insistence that it could not meet this schedule and its subsequent requests for extensions of time, on November 29, 1984, the Special Master

issued a second scheduling order calling for completion of discovery by January 25, 1985.

Under the new scheduling order, objections to the parties' document requests, which had been served on November 14, 1984, were to be served by December 3, 1984. Manhattan/Bayard served their objections on that date but Sweater Bee did not. Rather, counsel for Sweater Bee, without obtaining an extension of time, instead wrote a lengthy letter to the Special Master urging him to adopt a discovery schedule ending in April, 1985.* The Master then called for a hearing on December 10,

*Sweater Bee eventually served a marked-up copy of Manhattan/Bayard's document request with handwritten objections on December 7, 1984, the date he had suggested these objections should be due. Counsel never served a typewritten copy of such objections.

1984.

At that hearing, which was necessitated solely by counsel for Sweater Bee's complaints about and refusal to comply with the discovery schedule, counsel for Sweater Bee repeatedly stated its inability to produce documents in accordance with the schedule. Yet, at that hearing, counsel for Sweater Bee revealed that he had not yet reviewed any documents for production and that he had not even communicated with his client regarding document production until after formal document requests had been served on November 14, 1984, even though he had received preliminary document requests on October 18, 1984 and knew as early as October 4 that discovery would be

required.* (12/10/84 Tr. at 6-8, 25-26.) Counsel for Sweater Bee also stated that he would be unable to even begin reviewing documents until the week of December 17, 1984, ten weeks after the first hearing before the Master. (Id. at 32.)

When the Special Master, apparently recognizing that Sweater Bee's difficulties in meeting the discovery schedule stemmed from its own failure to proceed promptly, declined to extend the discovery schedule in accordance with the wishes of counsel for Sweater Bee, Sweater Bee sought relief from the Court. On December 10, 1984, Sweater Bee made a motion, returnable December 27, 1984,

*Mr. Grossman stated that he took no steps toward document production until after he received formal requests because Manhattan/Bayard's earlier informal requests were "tentative". (12/10/84 Tr. at 11-12.)

seeking to have the Court vacate the Special Master's scheduling order.* Because counsel for Sweater Bee indicated that it believed the discovery process should be stayed pending resolution of its motion,** Manhattan/Bayard requested a prompt hearing before Judge Broderick. The motion was heard on December 18, 1984, at which time Sweater Bee also made an oral motion to disqualify the Special Master. Judge Broderick denied both motions in very strong terms. (12/18/84 Tr. at 3, 9-10.)

On December 19, 1984, the parties

*The motion was served on Manhattan/Bayard counsel by mail despite the fact that Mr. Grossman's office is across the street from Mr. Sweeney's office and one block from Mr. Fields' office.

**Sweater Bee even indicated in its notice of motion that it would be glad to agree to an adjournment of its motion, thus further delaying the proceedings before the Special Master.

met again with the Special Master. That hearing was devoted to (1) a discussion of Sweater Bee's objection to paying for the time of the Special Master's associate (see 12/9/84 Tr. at 13-27; (2) Sweater Bee's motion to the Special Master for his recusal (which the Special Master denied) (see 12/19/84 Tr. at 4-13); and (3) a discussion of when Sweater Bee would begin producing documents (see Tr. at 37-64). After a great deal of discussion, the Special Master ordered substantial completion of document production by December 28, 1984 with full production by January 5, 1985. The date for service of objections and answers to interrogatories was adjourned, at Sweater Bee's request, to January 9, 1985.

On January 3, 1985, Sweater Bee's counsel informed counsel for Manhattan/Bayard that Sweater Bee had not begun

copying its documents and would only be ready to allow Manhattan/Bayard to inspect the documents the next day. Manhattan/Bayard believed that the discovery scheduled contemplated actual production of documents by January 5, 1985 and were prepared to supply copies of their documents to Sweater Bee at that time. At a hearing before the Special Master on January 22, Manhattan/Bayard counsel, having failed to receive the documents despite repeated efforts to obtain production, requested that Sweater Bee be ordered to provide copies of the documents, and Mr. Grossman thereupon made a number of commitments as to document production, including a commitment to deliver copies of all Sweater Bee documents by January 29, 1985. Sweater Bee, however, disregarding these commitments and the Special

Master's orders,* failed to produce copies of its documents until February 18, 1985 -- fully six weeks after they were due. In order to obtain such production, Manhattan/Bayard's counsel was forced to write the Special Master on February 4 and February 14, 1985 and again request that such production be ordered.**

Needless to say, Sweater Bee's failure to produce its documents for six

*At the hearing before the Special Master on January 22, 1985, Sweater Bee was ordered to produce its invoices by January 25, 1985. (1/22/85 Tr. at 21-22, 28.) However, no production was made on January 25. Indeed, January 29 also came and went without any production of documents (except financial statements which Sweater Bee's counsel had promised to produce by January 24, 1985.) The invoices were finally produced on February 4 1985.

**Following the February 4 letter, the Special Master wrote to Mr. Grossman, once again ordering him to comply. Full compliance was not forthcoming, however, until two weeks later.

weeks brought the discovery process to a virtual standstill -- and was a substantial factor in delaying these proceedings. Depositions and hearings obviously could not proceed until document production had been made.

Sweater Bee's delinquency in the production of its documents is only one instance in these proceedings in which Sweater Bee has failed to meet deadlines and otherwise shown blatant disregard for the Special Master's rulings. For example, Sweater Bee's performance with regard to answers to Manhattan's interrogatories was also woefully slow and inadequate.

On January 8, 1985, Sweater Bee served an unverified "proof" of its responses to Manhattan/Bayard's

interrogatories.* On January 11, 1985, counsel for Manhattan/Bayard wrote to counsel for Sweater Bee noting serious deficiencies in Sweater Bee's "proofed" responses and requesting complete substantive information by the following week. No response was received until 1:15 p.m. on January 22, 1985 (the date of a hearing before the Master scheduled for 2:30 p.m.), when Sweater Bee's counsel had delivered a 12-page letter to Manhattan/Bayard counsel, addressing Manhattan/Bayard's "criticisms" of Sweater Bee's interrogatory responses, refusing to answer some interrogatories and committing to provide certain further information as to certain interrogatories

*Manhattan/Bayard's interrogatories were served on December 7, 1984. Sweater Bee's answers were originally due on December 21, 1984 which was extended, at Sweater Bee's request, first to December 28, 1984 and then to January 8, 1985.

but furnishing virtually no additional material.

On January 29, 1985, counsel for Manhattan/Bayard wrote to the Special Master seeking orders requiring Sweater Bee to provide full responses to the interrogatories which Sweater Bee had failed to adequately answer and refused to answer fully. On January 31, 1985, the Special Master ruled that Sweater Bee must respond to five of the interrogatories in question. However, Sweater Bee did not respond to these interrogatories or provide any further answers as it had committed on January 22, despite Manhattan/Bayard's repeated requests and the Special Master's orders, until March 12, 1985 -- again fully six

weeks after it was ordered to do so.* This delay substantially hindered the discovery process, especially the taking of depositions.** The responses that Sweater Bee did provide on March 12, 1985 were unverified and, in several respects, still inadequate. Further, despite repeated requests by Manhattan/Bayard and orders*** by the Special Master, Sweater

*At the hearing on February 21, 1985, the Special Master ordered that the interrogatory responses be provided by February 27, 1985. (2/21/85 Tr. at 109, 150.) They were not.

**The interrogatories at issue went to the heart of this matter. For instance, interrogatory No. 1 requested that Sweater Bee set forth its method of calculating its actual damages -- the only type of damages Manhattan/Bayard contend are properly recoverable in a civil contempt proceeding. (See discussion supra at 44-46.) Thus, without this information, Manhattan/Bayard could not usefully have gone forward with depositions.

***See, e.g., letters from Manhattan counsel dated February 4, February 14, April 16 and April 26, 1985; Special

Bee did not serve verified responses to Manhattan/Bayard's interrogatories until May 6, 1985 -- nearly four months after Manhattan/Bayard served its verified responses to Sweater Bee's interrogatories.

The primary excuse given by counsel for Sweater Bee to explain these delays is that he was ill with the flu for the better part of the six-week period from February 7 through March 11, 1985. While Manhattan/Bayard do not believe it useful to question the severity of Sweater Bee's counsel's illness, they do contend that his illness does not excuse these long and repeated delays. First, it is apparent that Sweater Bee's counsel was able to perform

Master's letter dated February 4, 1985; 2/21/85 Tr. at 150; 3/1/85 Tr. at 33-34, 38-42; 4/5/85 Tr. at 410; 4/17/85 Tr. at 41-45.

certain work during this period. Thus, during the period of his claimed illness, Sweater Bee's counsel wrote several lengthy letters,* prepared and served five notices of deposition, and attended two settlement conferences before Magistrate Dolinger and a lengthy hearing before the Special Master. Apparently, Sweater Bee's counsel was willing to perform work designed to further his client's case, but was unwilling to provide discovery to Manhattan/Bayard as ordered by the Special Master. Secondly, Sweater Bee counsel's illness cannot excuse Sweater Bee's failure to perform tasks that should have been completed well before his illness purportedly

*For example, he wrote a nine-page letter dated February 7, 1985, a seven-page letter dated February 19, 1985 and a four-page letter dated February 27, 1985.

began. For example, his illness cannot excuse Sweater Bee's failure to produce its documents in a timely fashion because Sweater Bee's counsel did not become ill until nearly five weeks after the date the documents were to have been produced; full interrogatory answers were due on January 9, 1985.

Finally, Sweater Bee's failures to comply with the Master's orders continued well after Mr. Grossman's illness had ended. For example, on April 5, 1985, Mr. Grossman was ordered by the Special Master to serve verified answers to interrogatories immediately and by specific dates to produce certain documents and information to Manhattan/Bayard, and to respond to Manhattan/Bayard's motion for an order of preclusion. (4/5/85 Tr. at 397, 410.) Sweater Bee performed none of those tasks

within the required time. (See letter dated 4/16/85 from Thomas J. Sweeney, III to the Special Master.) At a hearing on April 17, 1985, Sweater Bee was again ordered to serve verified answers to interrogatories, this time by April 23, 1985. (4/17/85 Tr. at 45.) Again, Sweater Bee did not comply with the Master's Order.* The answers were not served until May 6, 1985.

There have been additional, more recent occasions on which Sweater Bee has missed deadlines and otherwise shown disrespect for rulings made in these proceedings. For example, counsel for Sweater Bee ignored the August 29, 1985 deadline, set by the Special Master, for

*On April 26, 1985, Mr. Grossman wrote to the Special Master giving various excuses why he had not complied with the Master's Order. That letter gave no date by which Sweater Bee would comply with that Order.

providing counsel for Manhattan/
Bayard with an expert report in
anticipation of the expert's deposition
on September 4, 1985.* Although Sweater
Bee's request for an extension of time
was denied by the Special Master, Sweater
Bee nonetheless failed to serve the
expert report on time. Instead, Sweater
Bee delivered the expert report at 8 p.m.
on Sunday, September 1, 1985 to the
summer residence of counsel for
Manhattan/Bayard's mother-in-law.

In addition, Mr. Grossman's
conduct has lead to considerable time

*There was no excuse for this failure to comply. Mr. Grossman had been aware of the substance of the testimony of Manhattan's accounting expert, Mr. Forcheskie, since early July. Moreover, he had two weeks between his first contact with Mr. Soble and the deadline. The record, which shows no contact whatsoever between Mr. Soble and Mr. Grossman between August 20 and August 28 (Soble Tr. 2903.), suggests not even a good faith effort to comply.

being wasted by both the Special Master and opposing counsel because he has arrived late or simply not attended scheduled hearings. For example, on September 5, 1985, Mr. Grossman failed to appear for the scheduled hearing due to illness but did not inform the Special Master and Counsel that he would not appear until that morning. All concerned were then forced to wait until Mr. Grossman arrived, at noon, some two and one-half hours late. On June 17, Mr. Grossman cancelled a hearing, but failed to so inform the Master who, despite illness, was prepared to proceed.*

When accused of delaying and

*Mr. Grossman was also over forty minutes late for a hearing held on March 13, 1985. (3/13/85 Tr. at 3.) On April 2, 1985, Mr. Grossman and Mr. Herling showed up over an hour late for a scheduled deposition. (See Herling Dep. Tr. 115-116.)

needlessly multiplying the costs of these proceedings, Sweater Bee's response has been to attack Manhattan/Bayard counsel and the Special Master as having also caused their share of delay. (See, e.g., 2/21/85 Tr. at 54-55.)* However, as the Special Master has previously recognized (see 2/21/85 Tr. at 57) and as the discussion above reveals, Sweater Bee's conduct, through its counsel, has been

*Primarily, Sweater Bee has argued that Manhattan/Bayard failed to promptly respond to Sweater Bee's request for a protective order specifying the conditions under which documents could be shown to experts. Sweater Bee proposed its protective order on January 18, 1985. On February 7, 1985, Manhattan/Bayard responded, objecting to certain provisions in Sweater Bee's order. On February 21, 1985, at Sweater Bee's insistence, a protective order was signed by the Special Master. However, there could be no legitimate prejudice to Sweater Bee in the interim period because Sweater Bee did not even produce the bulk of its documents until February 18, 1985 -- only three days before the protective order was signed.

the major cause of delay in these proceedings. Had Sweater Bee complied with the Special Master's orders in the discovery process, these proceedings could have been shortened by at least several months. Further, had Sweater Bee cooperated, the numerous pre-hearing conferences devoted to Sweater Bee's refusal to meet discovery deadlines could have been avoid entirely.

In sum, Sweater Bee and Mr. Grossman's conduct in this proceeding has caused substantial delays, expense and inconvenience to the Special Master, opposing counsel and our clients.*

*Sweater Bee counsel has attempted on numerous other occasions to delay the proceedings even further. Fortunately, these efforts, and a number of other attempts to delay the proceedings even further were rejected by the Special Master. See, e.g. 9/23/85 Tr. at 3062-69 (Grossman request for adjournment because he did not bring his notes for cross-examination of Messrs. Hamel and

During this proceeding, the Special Master has been reluctant to impose sanctions such as orders of preclusion, but has indicated his willingness to impose monetary sanctions. We believe it is now appropriate to impose general sanctions for Sweater Bee's failure to meet discovery in a timely fashion and otherwise comply with the Special Master's orders.

First, we urge the Special Master to recommend to Judge Broderick that the costs of this proceeding* be assessed 75% against Sweater Bee and 25% against the Manhattan/Bayard parties. In his discretion, the Master may determine that some or all of these costs should be assessed against Sweater Bee's counsel

Miller denied.)

*I.e., the Special Master's fees and expenses and the cost of transcripts.

pursuant to Rule 37(d) and/or 28
U.S.C. § 1927.

Second, we believe that an award of attorneys' fees and expenses to Manhattan/Bayard representing the additional expense generated by counsel's efforts to achieve compliance by Sweater Bee with the Master's discovery and other orders is appropriate. For instance, the Master could award attorneys' fees representing the time counsel spent at hearings devoted solely to Sweater Bee's compliance with discovery, or to preparing correspondence to the Master to address Sweater Bee's failures to provide discovery, or for unduly delaying the proceedings due to lateness or failure to attend.

Rule 37 and 28 U.S.C. § 1927 both allow the assessment of costs and award of attorneys' fees sought by Manhattan/

Bayard. In Chesa International, Ltd. v. Fashion Associates, Inc., 425 F.Supp. 234 (S.D.N.Y. 1977) aff'd 573 F.2d 1288 (2d Cir. 1977), the trial court upheld a Special Master's recommendation of an award of attorneys' fees occasioned by defendant's failure to comply with a discovery order based on Rule 37. The Court also affirmed the Special Master's finding that the attorney should be held jointly liable for the award because "he 'contributed significantly to the pattern of delay and defiance. . . ." 425 F.Supp. at 238. See also Tamari v. Bache & Co., 729 F.2d 469, 472 (7th Cir. 1984) ("where a party has received adequate notice that certain discovery proceedings are to occur by a specific date and that party fails to comply, a court may impose sanctions [pursuant to Rule 37] without a formal motion to compel. . . .")

An award of attorneys' fees under Rule 37 is warranted even if the failure to comply with the discovery order is not willful. In Argo Marine Systems, Inc. v. Camar Corp., __ F.2d __ (2d Cir. 1985), the Court affirmed the trial court's finding that negligent failure to comply with a discovery order was sufficient to warrant monetary sanctions. Accord, Stanzcale v. First National City Bank, 74 F.R.D. 557, 560 (S.D.N.Y. 1977) (Broderick, J.) (award of costs and attorneys' fees granted even though failure to comply with discovery order "could not be characterized as wilful" where conduct was not "'substantially justified.'"); Tamari v. Bache & Co., 729 F.2d 469, 474 (7th Cir. 1984).

Under 28 U.S.C. § 1927, an award of attorneys' fees and costs can be assessed against an attorney "who

intentionally abuse[s] the judicial process so as to cause their opposing counsel unnecessary expense and delay." W.H. Brady Co. v. LEM Products, Inc., 521 F.Supp. 676, 677 (N.D. Ill. 1981). In Lipsig v. National Student Marketing Corp., 663 F.2d 178 (D.D.C. 1980), the Court found that "dilatory tactics during discovery and courtroom hearings" and consistent failure "to meet scheduled filing deadlines" were factors which warranted an award of compensatory attorneys' fees. Further, costs and attorneys' fees may be awarded against any party who abuses the discovery process regardless of whether they are the prevailing party. McEnteggart v. Cataldo, 451 F.2d 1109, 1112 (1st Cir. 1971) cert. denied 408 U.S. 943 (1972).

Regardless of the ultimate outcome of these proceedings, Sweater Bee

should not escape responsibility for the substantial delay and extra expense caused by its dilatory conduct. An assessment of costs and attorneys' fees against Sweater Bee and/or its counsel is warranted and clearly within this Court's discretion pursuant to Rule 37 and/or 28 U.S.C. § 1927.

[Excerpt from Manhattan/Bayard's
Post-Hearing Reply Memorandum]

III

SWEATER BEE'S CONDUCT CAUSING
INCREASED COSTS AND SUBSTANTIAL
DELAY OF THESE PROCEEDINGS WARRANTS
AND ASSESSMENT OF AT LEAST 75%
OF THE COSTS AGAINST SWEATER BEE

In opposition to Manhattan-Bayard's request that the costs of this proceeding be apportioned at least 75% against Sweater Bee and at most 25% against Manhattan-Bayard, Sweater Bee initially raises several procedural objections but then largely admits its delays and failures to comply with orders, albeit proffering numerous excuses.

First, Sweater Bee argues that Manhattan/Bayard's request for an apportionment of costs is deficient because Manhattan-Bayard did not submit a supporting affidavit. (Declaration of

Dennis Grossman dated December 13, 1985 ("Grossman Dec.") ¶ 3.) Manhattan/Bayard is at a loss to understand this objection because, as Sweater Bee well knows, virtually all applications and motions in this proceeding have been made either orally or by letter with no supporting affidavit. Further, the events Manhattan/Bayard complain about are documented in writing and are within the direct knowledge of the Special Master. In any event, counsel for Manhattan/Bayard signed the memorandum and, under Fed.R. Civ. P. 11, his signature signifies that counsel had a good faith belief that the statements made therein were accurate.*

*While Manhattan/Bayard are unaware of any requirement that a post-hearing request for costs must be accompanied by an affidavit, if the Special Master believes an affidavit is required, counsel for Manhattan/Bayard will

Sweater Bee's other procedural objections are that Manhattan/Bayard did not comply with either Local Rule 3(f) requiring an attempt at non-judicial resolution of Rule 37 issues before seeking judicial relief or Local Rule 3(1) requiring a request for an informal conference before making the motion. (Grossman Dec. ¶ 3.) These objections are frivolous. Manhattan/Bayard's counsel made numerous attempts, both orally and by letter, attempting to resolve Sweater Bee's defaults in providing discovery without judicial intervention. (See e.g. Mr. Sweeney's letters to Mr. Grossman dated 12/14/84, 1/11/85 and 1/23/85.) Further, the parties attended numerous conferences before the Special Master in an attempt

promptly provide one.

to resolve Sweater Bee's failures to meet its discovery obligations.

Manhattan/Bayard contends that Sweater Bee greatly delayed these proceedings by taking several months to produce its documents. (See M/B post-hearing mem. at 112-115.) Sweater Bee admits that it did not even begin searching for documents until November 14, 1984, even though Manhattan/Bayard had served preliminary document requests a month earlier (Grossman Dec. ¶ 5.), but contends that this failure to promptly commence searching for documents was reasonable because it had no obligation to look for documents until formal requests were served. This lame argument has already been rejected by the Special Master. (12/10/84 Tr. at 8.) The fact that Sweater Bee had "thousands of documents" to look through only

emphasizes the need for Sweater Bee to have begun its document search as early as possible. (Grossman Dec. ¶ 6.)

Sweater Bee does not dispute that it took six weeks to produce copies of its documents but attempts to excuse this delay by blaming the copying services it hired (Grossman Dec. ¶¶ 9-12) and its counsel's illness. (Grossman Dec.

¶¶ 12-13, 16.) As previously pointed out, counsel's illness is no excuse because counsel did not fall ill until February 7, 1985 -- five weeks after the documents should have been produced. (See M/B post-hearing mem. at 119.) The difficulties with the copying services also do not justify Sweater Bee's six-week delay in producing documents. Sweater Bee was responsible for properly supervising the copying services and ensuring that they did their work

promptly. Obviously it failed to conscientiously do so.

Sweater Bee also does not deny that it failed to provide full interrogatory responses in a timely fashion. Sweater Bee admits that on January 31, 1985 the Special Master ordered Sweater Bee to respond to certain disputed interrogatories, but that Sweater Bee did not provide any responses until March 12, 1985. Sweater Bee also admits that it did not provide full verified responses to Manhattan/Bayard's interrogatories until May 6, 1985. (Grossman Dec. ¶¶ 19-21.)

Sweater Bee again blames its counsel's illness for its 5 1/2-week delay in submitting its response to the disputed interrogatories. However, on February 21, 1985 (three weeks after Sweater Bee was originally ordered to

respond), the Special Master ordered the responses to be served by February 27, 1985 (2/21/85 Tr. at 150). Sweater Bee's counsel concedes that he was not ill from January 31, 1985-February 7, 1985 and February 18, 1985-February 27, 1985. Thus, Sweater Bee's counsel had 2 1/2 weeks while he was free from illness to prepare the 9 1/2-page response that was ultimately served.*

Sweater Bee does not even attempt to justify the length of time it took to serve a full verified set of interrogatories but instead claims,

*It is worth recalling that Sweater Bee's counsel prepared several letters and notices of deposition during the same period. (See M/B post-hearing mem. at 118.) Sweater Bee's counsel contends that the nine-page letter he wrote dated February 7, 1985 was prepared before that date and thus before he became ill. (Grossman Dec. ¶ 25.) Yet the Declaration of Dr. David Goebel states that Sweater Bee's counsel became ill "on or about February 7, 1985." (at ¶ 4.)

essentially, that it didn't matter because Manhattan/Bayard had the right to use the unverified responses as verified. However, as Sweater Bee admits, its interrogatory responses were contained in various documents served at different times (Grossman Dec. ¶ 21), and were thus unwieldy and difficult for Manhattan-Bayard to use. Manhattan/Bayard had a right to insist on -- and Sweater Bee had an obligation to promptly provide -- one document containing full verified interrogatory responses.

With the exception of Manhattan/Bayard's contention that Sweater Bee failed to serve Mr. Soble's expert report on time, Sweater Bee admits the other delinquencies of Sweater Bee's counsel alleged by Manhattan/Bayard, although again Sweater Bee's counsel offers a variety of excuses. (Grossman Dec.

¶¶ 30-36.) Given the consistency of Sweater Bee's counsel's defaults and failures to meet deadlines, these excuses simply cannot be accepted to justify Sweater Bee's counsel's conduct.

As to Sweater Bee's failure to serve Mr. Soble's expert statement on August 29, 1985, as required, Manhattan/Bayard deny that any permission was granted allowing Sweater Bee to serve the document late as claimed by Sweater Bee. On August 29, 1985, counsel for Sweater Bee called the office of counsel for Manhattan/Bayard requesting that we consent to his proposal to allow him to deliver the expert statement to Mr. Sweeney's vacation home in Rhode Island on Saturday, August 31, 1985. In that phone call, counsel for Sweater Bee indicated that he had applied to the Special Master for an extension of the

August 29 deadline but that his application was denied. On August 30, 1985, our office informed counsel for Sweater Bee by letter that we would not accept this proposal and that Sweater Bee was in default.

As he has done throughout these proceedings, counsel for Sweater Bee attempts to justify his conduct by pointing to alleged failures of Manhattan-Bayard to meet various deadlines. (Grossman Dec. ¶ 26.) As a brief analysis will show, the items that Sweater Bee cites as evidence of Manhattan/Bayard's alleged failures to meet deadlines pale in comparison to Sweater Bee's persistent dilatory conduct.

Sweater Bee complains that Manhattan/Bayard produced a certain number of cost sheets and invoices after

they were originally to be produced. The cost sheets, many of which related to non-Kimberly lines, were produced as soon as they were discovered in the course of Manhattan/Bayard's continuing search for documents. As to the additional invoices, they were produced promptly upon request by Sweater Bee's counsel. Of course, Manhattan-Bayard timely produced approximately 550 cost sheets and over 6000 pages of invoices.

Sweater Bee also argues that Manhattan/Bayard was several days late in producing certain information regarding its experts. However, on July 3, 1985, as ordered, Manhattan/Bayard provided Sweater Bee with the background, subject areas of testimony and documents provided to its experts. On July 8, 1985, Sweater Bee complained that this information was inadequate. On July 9, 1985, the Special

Master ordered Manhattan/Bayard "to elaborate a bit on the topics raised in his [Mr. Sweeney's] July 3 letter. . . ." and to provide some additional documents. Manhattan/Bayard promptly complied with this order.

Lastly, Sweater Bee argues that Manhattan/Bayard missed a deadline in their production of the profit and loss statements of Bayard and Silver Springs Sportswear.* However, Manhattan/Bayard's

*One additional item cited by Sweater Bee is Manhattan/Bayard's offer into evidence of trial exhibit 84. Apparently, Sweater Bee's complaint is that Manhattan/Bayard offered exhibit 84 into evidence in their rebuttal case instead of their main case. Obviously, this item has nothing to do with any alleged failure to provide timely discovery. There is no question that exhibit 84 was timely produced to Sweater Bee. Indeed, the fact that Sweater Bee has to resort to citing this clearly irrelevant item reveals the difficulty Sweater Bee must have had in coming up with legitimate discovery delays to complain about.

counsel were previously unaware of the existence of these documents and produced them as soon as they learned of them.*

It is clear from the discussion above that none of the items cited by Sweater Bee regarding Manhattan/Bayard's alleged failures to meet deadlines compares with the repeated delays, defaults and outright refusals to obey the Master's orders by Sweater Bee throughout these proceedings. The apportionment of costs suggested by Manhattan/Bayard reflects the substantial delay, inconvenience and extra expense

*Moreover, Sweater Bee was given a full opportunity to take discovery on these documents, including a deposition of Mr. Hamel which Sweater Bee later waived.

caused by Sweater Bee's conduct.*

*As a last argument, Sweater Bee states that Manhattan/Bayard made its request for an allocation of costs "to distract from the merits of the proceeding. . . ." (Grossman Dec. ¶ 38.) Manhattan/Bayard are confident that their request for costs will not distract the Special Master from the merits of these proceedings any more than Sweater Bee's conduct throughout the proceedings distracted from his consideration of the merits of the issues to be decided. However, now that all the evidence has been submitted, the time is ripe for an assessment of costs.

[Excerpt From December 18, 1984
Hearing Before Judge Broderick]

THE COURT: All right, Mr. Grossman. Five minutes.

MR. GROSSMAN: Your Honor, at the outset --

THE COURT: I think you better start off by explaining what you are doing here. You were referred to a special master to hear and determine. What are you doing here?

MR. GROSSMAN: Your Honor, we are here because last Monday we served a motion returnable before your Honor to vacate the discovery scheduling order of the special master whom your Honor appointed, Mr. Neal Hurwitz, and we made that motion returnable before your Honor because we believe that the discovery schedule order was an abuse of discretion, was improper and not

authorized under the Federal Rules of Civil Procedure in light of the nature of the case and the nature of the discovery requests which the parties have served upon each other.

We had a conference before Mr. Hurwitz, on Monday, December 10, 1984. Since that time, we have received the transcript of the conference before Mr. Hurwitz and the transcript bears out my recollection of the proceedings before Mr. Hurwitz in that we believe that certain actions taken by Mr. Hurwitz and certain statements made by Mr. Hurwitz were inappropriate.

THE COURT: I thought he showed extreme reserve. I read the transcript.

MR. GROSSMAN: If I may have a second, your Honor --

THE COURT: You have two

minutes left.

MR. FIELDS: Could I ask Mr. Grossman to speak up a little? It is difficult to hear him.

MR. GROSSMAN: Earlier this afternoon I telephone your Honor's law clerk and I telephoned Mr. Sweeney, suggesting that the hearing before your Honor today be postponed for two days, for the following reason: We have a conference scheduled before Mr. Hurwitz tomorrow and at that conference scheduled before Mr. Hurwitz tomorrow I believe it would be appropriate to address to Mr. Hurwitz, in the first instance, a suggestion that he request leave from your Honor to recuse himself or withdraw as special master in this proceeding.

Unfortunately, we were unable to gain an adjournment of the present motion, and I was advised that it may be

appropriate to address the matter to your Honor in the first instance, although I would have preferred to address it to Mr. Hurwitz.

THE COURT: You better not address it to me. I am telling you that, You are sorely tempting my patience.

MR. GROSSMAN: Your Honor, with all due respect, if your Honor would wish to go off the record --

THE COURT: I don't wish to go off the record. I wish to stay on the record.

MR. GROSSMAN: Before Mr. Hurwitz on Monday, December 10, as well as in a telephone conversation which I had with Mr. Hurwitz the previous week, Mr. Hurwitz requested Sweater Bee's consent to not only paying his time at \$175 an hour but also paying for the time of his associate, Ms. Hoagland, at \$45 an hour,

and both during the telephone conversation which Mr. Hurwitz had with me as well as on the record at the hearing or at the conference on Monday, December 10th, Mr. Hurwitz stated that we should agree to his monetary request because he, in essence, has certain amounts of discretion in this proceeding and that it would be appropriate and be the discreet thing for counsel and the parties to go along with his suggestion in light of his position in this proceeding.

I discussed the matter with my client and I did inform Mr. Hurwitz at the conference on December 10th that it was Sweater Bee's position that it would be inappropriate and unauthorized for Sweater Bee and they would respectfully decline to pay the additional amount Mr. Hurwitz requested.

Mr. Hurwitz offered as a rationale, I might add, that Ms. Hoagland's time would be cheaper than his time, but that is just not correct, because, for example, at the conferences which are held before Mr. Hurwitz, both Mr. Hurwitz and his associate, Ms. Hoagland, attend and if we are billed for both of their time at the conference, we are being billed for \$220 per hour for that conference time.

In addition to that, it may be significant that the first bill which Mr. Hurwitz rendered as master to the parties, and I might add that Sweater Bee timely paid that bill, without prejudice to our rights-- the first bill Mr. Hurwitz rendered to the parties, each party's bill was approximately \$1800 for the latter part of September and the month of October, and that bill which Mr.

Hurwitz rendered on November 1st included only - Mr. Hurwitz' time and did not include any request for compensation for his associate's time, and it is our belief that Mr. Hurwitz understood that to be the arrangement pursuant to your Honor's order of reference and that as an afterthought Mr. Hurwitz asked the parties to pay not only for his own time in the amount of \$175 an hour but also for his associate's time in the additional amount of \$45 an hour and in his subsequent bill, rendered just last week, Mr. Hurwitz requested that Ms. Hoagland's time be paid from September through October, through and including November, even though his prior bill billed only for his own time, which we believe was the proper understanding under your Honor's order of reference.

Be that as it may, and getting

back to the question of propriety of Mr. Hurwitz' actions, regardless of whether your Honor contemplates requiring the parties to pay for Ms. Hoagland's time or not requiring the parties to pay for her time-- regardless of that position and regardless of that issue, we respectfully submit that it is very inappropriate for anybody vested with judicial or quasi judicial authority to state or suggest on or off the record, to participants that it would be advisable for them to pay additional amounts of money which that official has requested because the official has a certain amount of authority in the proceeding, and certainly in my practice, I have never been confronted with anything like that. I think it was inappropriate and regardless of Sweater Bee's response at this point we respectfully submit we

cannot get an impartial hearing before Mr. Hurwitz and that there is, at a minimum, a reasonable basis for an appearance of impropriety sufficient to require the disqualification of Mr. Hurwitz because of his request and suggestion in connection with his request for monetary compensation.

THE COURT: I will hear from the plaintiffs.

MR. SWEENEY: Your Honor, this request for disqualification of the master, which we were only told about about two hours ago, we believe this is just another in a long series of actions that Mr. Grossman has taken on behalf of his client to try and prevent the civil contempt from being heard by the master, starting with his motion for reargument directed to your Honor, going to an appeal, an appeal which was dismissed on

jurisdictional grounds.

He has refused to meet with us when he has been ordered to meet with us at particular times. He used commitments as an excuse. He has brought this motion to try and vacate what we think is a very fair schedule and is a schedule that people should be able to make, assuming they use their best efforts to make it. What he has done is instead of trying to meet the schedule and get documents from his client, to answer interrogatories and prepare interrogatories, he has chosen to make various applications to the master and to ignore discovery schedules, and now what he has done is, he has seen an opportunity in the master's request that we pay for Ms. Hoagland's time as well-- he has seen an opportunity to disqualify the special master and the reason he does that is because he doesn't

like the discovery schedule the master has put down and doesn't like this whole proceeding and he told your Honor that in August and told the Court of Appeals that.

This is just an excuse, in our view, to get rid of the special master and to gain some time.

Just to illustrate the delaying tactics here, Mr. Grossman made his motion to vacate the schedule on December 10th. That was December 10th, after we had had on December 10th a hearing with the master, and he didn't make any suggestion to the master or to us that he was going to make such a motion, and he served that motion by mail, so that we didn't get it for a couple of days and made it returnable on the 27th of December, the Thursday after Christmas, and he included a statement to the effect

that he would agree to any reasonable adjournments.

We took the position that your Honor should hear us as soon as possible and we realize your schedule is very difficult, and we called up Mr. Grossman and asked him whether it was his position that a stay of discovery was in effect and he wouldn't respond to that statement-- at least he wouldn't respond to it until we wrote a letter to him, with a copy to the special master, reciting that he wouldn't agree or disagree to the statement that a stay was in effect.

All of his activities here, and I think especially this suggestion of disqualification, are designed to prevent the proceeding from going ahead or to delay the proceeding and it is part and parcel of one group of actions all with

the same end in mind, your Honor.

I don't think there is anything that the special master has said in this transcript, which I think is what Mr. Grossman is referring to, that was improper and Mr. Grossman told me on the phone today that the statements that the special master made to him were pretty much the same as the statements that are in the transcript.

This is a tempest in a teapot. If your Honor should rule, as I think you should, that the special master is entitled to bill for his associate's time, the matter will be resolved and Mr. Grossman's attempt to take advantage of an offhand remark is just outrageous and is intended to get rid of the special master.

MR. GROSSMAN: May I respond to that, your Honor?

THE COURT: Yes.

MR. GROSSMAN: Your Honor, I have never refused to meet with Mr. Sweeney or with Mr. Fields --

THE COURT: I will tell you, Mr. Grossman, you can take it up with the special master. I deny your motion. I would point out to you that this reference to the special master was a reference to hear and determine with respect to discovery questions and I am exercising a great deal of restraint in not assessing attorney's fees against you for making this frivolous motion to me. If there is a repetition of it, I am putting you on notice that I will seriously consider assessing attorney's fees.

[Excerpt from Appellant's
Petition to the Second Circuit
for Panel Rehearing]

THE \$30,000 DISCOVERY SANCTIONS

Sweater Bee seeks reversal of the \$30,000 discovery sanctions substantively for lack of support and procedurally for want of specific findings. The precedent consistently requires specificity in imposing large sanctions (Sw. Bee br. 95 ¶ 2). Yet the master merely stated in conclusory fashion that he "essentially agree[d]" with Manhattan-Bayard's presentation and found Sweater Bee's to be "woefully inadequate" (A.44.). This type of conclusory trial court "agreement" with one side's presentation -- without any greater specificity -- has commanded reversal in numerous other cases where the stakes were far less. See, e.g., Sanko Steamship Co. v. Galin, 835 F.2d 51, 53-54 (2d Cir. 1987)

(reversal for specific findings re \$1,000 sanctions).

Here the lack of specificity is doubly prejudicial. It prejudices Sweater Bee who loses \$30,000 and prejudices its counsel who now is exposed to bar disciplinary proceedings over alleged "numerous failures" and "improper conduct" never specified by the master.

The present affirmance also vitiates the concept of specificity. If trial courts may impose \$30,000 sanctions by reciting an "essential agree[ment]" with one side and "woefull inadequa[cy]" in the other -- which is the totality of the master's finding here (A.44). -- then effectively there is no specificity requirement. Trial courts which impose sanctions always "agree" with the party who seeks them. Under the present affirmance, trial courts could receive a

lengthy sanctions request, recite their "essential agree[ment]" with it (as the master did here), recite that the response is "woefully inadequate" (as the master also did here), and then impose enormous fines with conclusory accusations against counsel, exposing parties to financial loss and counsel to discipline, never revealing the specifics of their findings, rationale nor conclusions.

The danger is serious. Even the most conscientious trial judge may be led to err by relying on a movant's version of the alleged "facts" unless the trial court itself undertakes an independent review and explanation of the underlying facts and circumstances. Specific findings are essential to this process. Otherwise, conscientious trial judges -
- by reciting a mere "agreement" with a

sanctions request and "woefully inadequacy" in the opposition -- inadvertently may conceal erroneous findings, incorrect conclusions or excessive use of discretion, while imposing crippling fines on a party and serious consequences on its counsel.

In every reported case we have found, parties who suffered substantial sanctions have enjoyed the protection of specific findings below. Those findings ensured that the District Court carefully examined and explained each allegation (rather than writing vaguely as the master did here) because of the serious consequences for a party financially and for its counsel professionally. Every other litigant has enjoyed this fundamental protection. Only Sweater Bee in this case has been denied it.

The lack of specificity by the

master prejudices both Sweater Bee and its counsel. Specific findings would have refuted Manhattan-Bayard's request for sanctions. Its request contains numerous errors in its statement of alleged "facts". Specific findings would have forced the master to confront them. Instead, the master was able to avoid these errors by avoiding specific findings and by reciting instead his conclusory statements of "essential agree[ment]" and "woefull inad-equa[cy]". The errors are pervasive. Space does not permit a recapitulation of all Manhattan-Bayard's errors in discussing discovery. [fn omitted].

